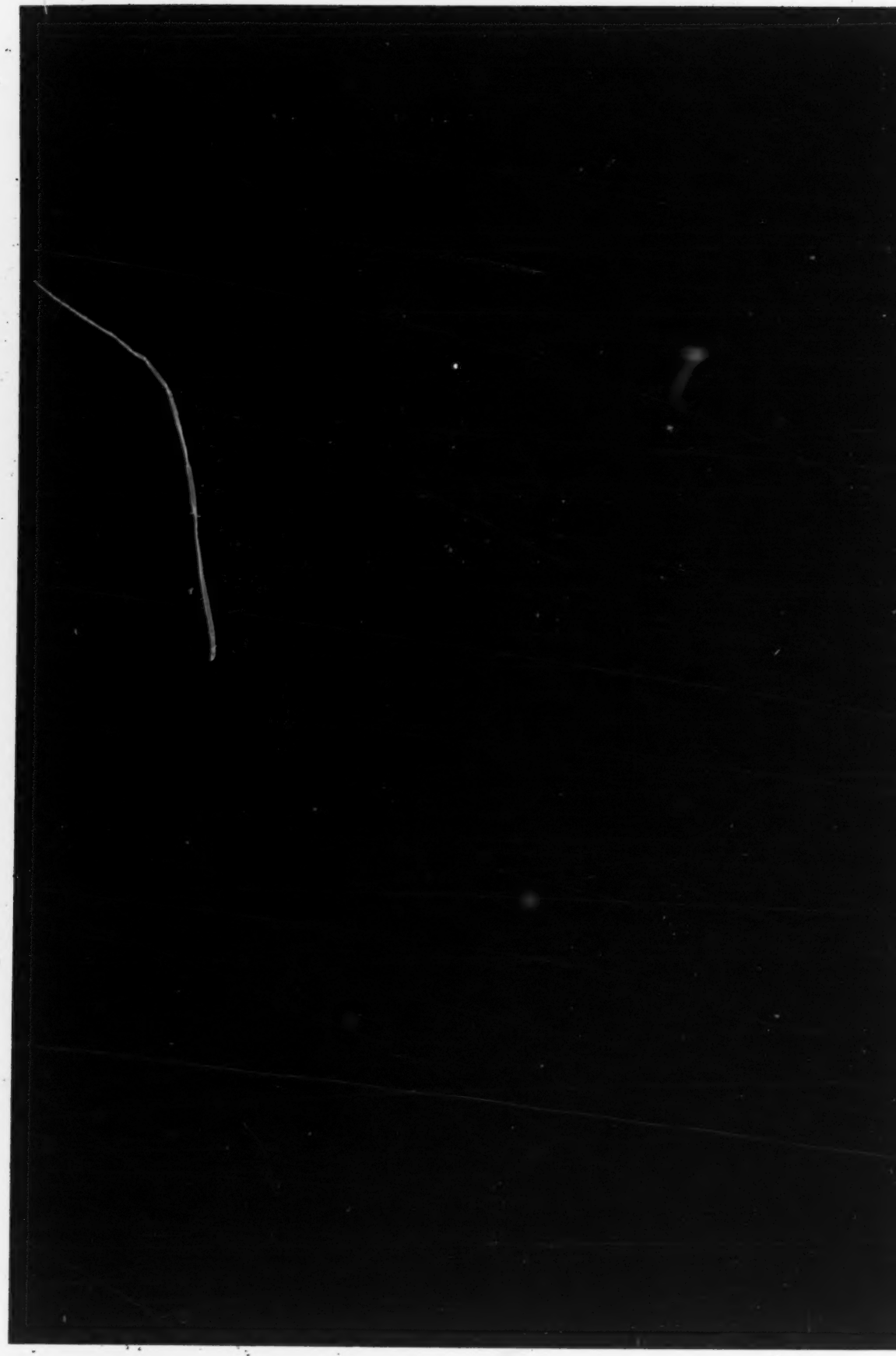

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of the district court (J.S. 24a–29a) enjoining and restraining the appellant and others from engaging in concerted price fixing in the sale and distribution of meat products manufactured by the defendant producers and from boycotting or inducing the boycotting of distributors who are not members of the appellant union, in violation of Sections 1 and 2 of the Sherman Act.

The complaint charged that the appellant union

and three producers of frankfurters in the New York metropolitan area, Olympia Provision and Baking Co., Inc., Sabrett Food Products Corp., and Superior Frankfurter, Inc., had, since at least 1949, combined and conspired to fix and maintain prices, terms and conditions of sale for frankfurters, to allocate customers and to boycott distributors who did not belong to the defendant union (J.S. 3a). Defendants Sabrett and Superior were severed and subsequently entered into consent judgments; defendant Olympia defaulted and waived further notice under Rule 55 of the Federal Rules of Civil Procedure (J.S. 2a–3a). After trial the court found that the appellant had conspired to fix and maintain prices and to boycott non-member distributors but that the government had failed to show any agreement to allocate customers. The appellant filed a petition for rehearing based in part upon this Court's intervening decision in *American Federation of Musicians* v. *Carroll,* 391 U.S. 99. After reargument, the court, in a memorandum opinion,[1] distinguished the *Carroll* case, denied appellant's motion for dismissal and entered its final judgment.

During the period covered by the complaint, Sabrett, Olympia and Superior manufactured frankfurters and sold them to customers such as refreshment stands, luncheonettes and street vendors. The products were distributed both directly through employee-drivers of the defendant manufacturers, and through independent distributors who bought from the manufacturers and resold to similar customers (F. 2,

[1] Since this opinion is not included in the jurisdictional statement, it is printed as Appendix "A" to this motion.

13).[2] Distributors of defendant manufacturers belonged to appellant union, Local 627, which was comprised principally of other manufacturers' employee-drivers, salesmen-drivers and distributors (F. 2). Employee-drivers of the defendant manufacturers were not members of the appellant union; all were members of Locals 194 and 802 of the International Brotherhood of Teamsters. (F. 18, 19; Tr. 852–853, 1032, 1221–1222.)

Employee-drivers or "house drivers" of the defendant manufacturers received a basic salary plus commission, were not responsible for extending credit, and delivered to customers of their employers which were known as "house accounts" (F. 16, 17; Tr. 856–857, 980–981, 1160–1163, 1368–1376). The distributors who were members of Local 627 did not receive a wage or salary from the manufacturers; rather they purchased products from the manufacturers at a price calculated by subtracting an established discount from the list price at which the manufacturer sold to its house accounts, and then resold to their own customers at prices and on terms and conditions of sale which they independently established (F. 32, 35, 38; Tr. 44–46, 68–70, 187–188, 236–237, 1164–1166). The distributors operated as self-employed individuals, partnerships or corporations and paid taxes as such (F. 31, 34; Tr. 74–75, 547–548; Pl. Exs. 244, 245). They owned or leased the trucks they used, bore the expenses of maintenance and operation of

[2] "F." denotes findings of fact by the court below, reprinted at J.S. 3a–16a; "C." denotes the district court's conclusions of law, reprinted at J.S. 22a–23a; "Tr." refers to the transcript of proceedings in the court below.

the trucks, and suffered "almost all" bad-debt losses incurred in sales to their customers (F. 37, 38; Tr. 180–181, 428–429). In some instances the distributors employed persons to assist them in the conduct of their business. In these cases the distributors entered into collective bargaining contracts with Local 627 covering these employees (F. 23; Tr. 413–414, 1385–1386).

On the basis of these and other facts, the court held that the distributors were independent businessmen rather than employees of the defendant manufacturers (F. 43; C. 2). The court further found and concluded that the activities of the independent distributors had no adverse effect upon the wages or working conditions of employee-drivers and that the activities of the union on behalf of its distributor members served no legitimate labor objective (F. 46, 51; C. 3).

The independent distributors had sought membership in the union in about 1946 in order to attain larger profits (F. 44). The distributors were not solicited for membership in the union, and prior to their joining there were no other distributors in Local 627 (F. 44; Tr. 574–578, 583–584). After the distributors became members of the union, the union negotiated on their behalf a uniform minimum discount to be used by the manufacturers in calculating their prices to the distributors (F. 52–54). The union and the manufacturers also agreed that the latter would refuse to deal with non-union distributors and to maintain a welfare fund for the benefit of the distributors to which the manufacturers made payments (F. 5, 6, 55).

The original agreement between the union and the manufacturers was entered into in 1949 and fixed a minimum discount of five cents per pound (F. 52; Tr. 260–262, 819–820, 1040–1042; Pl. Ex. 261). This minimum discount remained in effect until August 1956, when it was raised to eight cents. At that time it also was agreed that the manufacturers would increase the list selling price by five cents per pound (F. 53–54; Tr. 165–167, 271–277, 394, 395, 732–735; Pl. Exs. 243, 261). At the time of the 1949 agreement fixing the minimum discount, it was agreed that the manufacturers would deal only with distributors who were members in good standing of the union (F. 55; Tr. 37–38; 948–949; Pl. Ex. 243). This boycott of non-member distributors was "largely successful" (F. 55; Tr. 672–680, 922–928, 1002–1008). These agreements were negotiated by Morris Horn, who was chief executive officer of Local 627 (F. 4, 52, 53, 54), and were entered into with the knowledge, authorization and ratification of the union (C. 6; Tr. 138–141; 296–298, 723–730).

ARGUMENT

With a single exception discussed below, pp. 10–11, appellant appears not to contest the sufficiency of the evidence upon which the court below found that it had conspired to fix prices and impose boycotts in violation of Section 1 of the Sherman Act. Rather, the principal question sought to be raised by this appeal is whether the union's practices affecting the distributors are exempted from the antitrust laws by the Norris-LaGuardia Act, 29 U.S.C. 101–115, as activities affecting a labor group or a group which

is involved in a labor dispute. Although the so-called labor exemption often presents troublesome questions, the issues raised in the instant case are neither novel nor difficult. Since the court below properly applied settled principles to fully-supported findings of fact, this appeal raises no issue which warrants plenary review by this Court.

1. The activities of a labor union on behalf of the employees it represents are exempt from the antitrust laws when those activities concern bargaining in pursuit of its members' interest in such subjects as their wages, hours and working conditions. Even though such activities may result in competitive restraints in product markets, the national labor policy as expressed by Congress in Section 6 of the Clayton Act, 15 U.S.C. 17, and in the Norris-LaGuardia Act, requires antitrust exemption. *E.g., Local 189, Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676. In addition, a union may properly organize and bargain on behalf of non-employee groups if such activity is necessary to protect the legitimate economic interests of employees. See *American Federation of Musicians* v. *Carroll*, 391 U.S. 99; *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91. Absent such a legitimate labor objective, however, a combination or conspiracy between a union and a nonlabor group to restrain trade in a product market violates the Sherman Act. See *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94; *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797. That this case lies squarely within the latter category is amply demonstrated on the record.

Although appellant argues (J.S. 5–6) that the distributors were "employees" or "workingmen" and organizable as such for purposes of collective bargaining, the court below properly held, on the basis of detailed findings, that they were independent businessmen. J.S. 18a–19a; F. 21–43. As noted *supra*, pp. 3–4, the distributors owned their trucks, operated as self-employed individuals, partnerships or corporations, purchased for resale the products of the manufacturers, established the prices and conditions for resale, assumed the risk of bad-debt losses, and determined their own hours and conditions of work. Thus, they met the usual tests for independent contractors. Cf. *Taylor* v. *Local No. 7, International Union of Journeymen Horseshoers*, 353 F. 2d 593 (C.A. 4), certiorari denied, 384 U.S. 969.

Of course the cases cited above make clear, and the court below fully recognized (J.S. 19a), that this determination is not necessarily decisive of the antitrust issues, for a union may, in certain circumstances, have a legitimate interest in organizing independent businessmen and bargaining on their behalf. The test for immunizing from the antitrust laws union activities on behalf of non-employee groups, such as these distributors, is whether there is "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." *American Federation of Musicians* v. *Carroll, supra*, at 106, quoting with approval the statement by Judge Levet (who also decided this case) at 241 F. Supp. 865, 887. If such economic

interdependence exists, the union may have a legitimate interest in fixing the compensation received by the independent businessmen for their services in order to protect employee-members' job opportunities and wage levels. See *Local 24, Teamsters Union* v. *Oliver, supra.* In the absence of such economic interdependence, however, independent businessmen may not form an association to maintain the prices of the products they distribute or otherwise to restrain competition. See *Los Angeles Meat and Provision Drivers Union* v. *United States, supra.*

Here, the district court explicitly found that "there was no legitimate labor objective served through the membership of the distributors in Local 627" (F. 51). The activities of the distributors before they joined the union "had no adverse effect upon the wages and working conditions of [the manufacturers'] employee-drivers, [and] in [no] way represented an attempt to evade the union wage scales of such employees" (F. 46). Following the inclusion of the distributors in Local 627, the manufacturers did not attempt to "play off" the employee-drivers against the independent distributors or in any other way to lower or otherwise affect the wages or other working conditions of the employees (F. 49).[3]

[3] Appellant argues (J.S. 3, 9) that the district court improperly excluded certain evidence showing actual and attempted conversions by other manufacturers of employee-drivers into owner-drivers, which evidence would have shown a valid justification for the union's activities. Since the decree in this case is addressed only to relations between appellant and the defendant manufacturers and their distributors, the relevance of any such evidence is not apparent. In any event, the appellant fails to indicate what evidence it wanted to introduce on this sub-

The conclusion that the activities of the appellant on behalf of the distributors did not serve any legitimate labor objective, and were not in furtherance of any interest of its employee members, is underlined by the fact that the employee-drivers of the defendant manufacturers do not belong to the appellant union but rather to the Teamsters (F. 18, 19). Local 627 does include in its membership employee-drivers of producers of processed meats other than the defendant manufacturers, but despite some occasional competition between these manufacturers and the distributors (F. 47), there is no indication that any economic interrelationship existed between the distributors and employee-members of Local 627. Indeed the union did not even seek to organize the distributors; it was the distributors who saw an advantage in union membership as a means of enhancing and protecting their own profits, and thus sought to join

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ject which the district court excluded. The appellant did introduce testimony of Gori Carfora that Sabrett had threatened to convert drivers into distributors (Tr. 1330–1334), testimony of Morris Horn that distributors were used to service house accounts during a 1935 strike (Tr. 1432–1439), testimony of John Lexis that he had been an employee of Olympia before becoming a distributor (Tr. 329–330), testimony concerning comparative cost studies on the use of distributors as against the use of employee-drivers made by Superior (Tr. 1096–1104, 1114–1115), and testimony designed to show the degree of competition between Sabrett and manufacturers whose employee-drivers are represented by Local 627 (Tr. 1240, 1327–1328). All of this testimony was introduced subject to the government's motions to strike. In a memorandum dated February 27, 1968 (reprinted herein as Appendix B, *infra*), the district court denied the motions to strike and accepted all of the appellant's evidence, noting an intention to consider and evaluate it in preparing the findings of fact.

the union without prior solicitation (F. 44). Plainly this is not a case like *Carroll, supra,* in which a union has sought to organize and regulate the compensation of independent businessmen in order to preserve wage scales and job opportunities of its own members. What is involved here is a transparent attempt by independent businessmen to use the cloak of union membership to insulate concerted activities in restraint of trade from the sanctions of the antitrust laws. See *Los Angeles Meat Drivers Union* v. *United States, supra* at 102–103; *Columbia River Packers Assn.* v. *Hinton,* 315 U.S. 143, 147. Participation by a union in such a scheme, which imposes direct restraints on a product market for the sole benefit of nonlabor interests, is entitled to no exemption from the normal operation of the antitrust laws.

2. Appellant challenges (J.S. 4, 9–10) the sufficiency of the evidence to support the finding that the appellant conspired with the manufacturers in 1956 to raise the list price of frankfurters (F. 54).[4] The primary evidence on this point was the deposition testimony of the president of Olympia, who died before trial but who was subject to cross-examination by the appellant at the deposition (Pl. Ex. 261, pp. 48–60). There was, however, additional support for this finding. See the

[4] Even assuming, *arguendo*, a legitimate interest on the part of appellant union in bargaining on behalf of the distributors for their wages, hours and working conditions, such an interest could not exempt from antitrust sanction an agreement between the union and the manufacturers to fix the retail price. See *Local 189, Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 (opinion of Mr. Justice White), 732-733 (opinion of Mr. Justice Goldberg). Presumably for this reason appellant apparently does not here rely on the labor exemption.

testimony of Gregory Papalexis, Tr. 891–898, relevant portions of which are quoted in the district court's Memorandum on Evidentiary Questions and Supplemental Memorandum, App. B herein at pp. 15–18, 21. See, also, Tr. 277–279, 719–736, 808–809, 819–820, 905–910; Pl. Ex. 4, 16, 17, 24. Certainly this finding is not clearly erroneous. Rule 52(a), F. R. Civ. P.; see *International Boxing Club* v. *United States,* 358 U.S. 242.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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JANUARY 1969.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

62 Civil 2031, Memorandum

UNITED STATES OF AMERICA, PLAINTIFF

v.

OLYMPIA PROVISION & BAKING CO., INC. AND PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, DEFENDANTS

LEVET, *District Judge:* Defendant Local 627 above mentioned moves for reargument of a decision by this court dated and filed April 5, 1968, and for a judgment dismissing the complaint against said defendant.

This defendant bases the motion upon a decision of the United States Supreme Court in *American Federation of Musicians of The United States and Canada et al* v. *Joseph Carroll et al.*, etc., filed May 20, 1968, U.S. Law Week May 21, 1968, p. 4441.

Defendant Local 627 points out that the Supreme Court in the decision just mentioned affirmed this district court in the dismissal of a treble damage private antitrust suit against a union, American Federation of Musicians. Local 627 contends that this court should have dismissed this suit against Local 627, an action involving not music or musicians but frankfurters, on the rationale the *Carroll* decision.

The mere fact that in one case I decided the issues in favor of a union and in another case decided the issues against another union is of no relevance. In the Musicians case I found a legitimate labor object in the challenged labor agreements and the United States Supreme Court recognized this, U.S. Law Week, *supra,* pp. 4441, 4442, 4443, while in the present case, 282 F. Supp. 819, 825, this court found that "The proof is clear that there was no legitimate labor objective served through membership of the distributors in Local 627." (Finding 51)

The facts of this case are neither similar nor equivalent to those in the Musicians cases. I have reviewed the objections to specific findings and I conclude that none of these objections has merit.

Motion to reargue granted; and after such argument, the motion is in all respects denied.

So ordered.

Dated: New York, N.Y., September 17, 1968.

RICHARD H. LEVET,
United States District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

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62 Civil 2031, Memorandum on Evidentiary Questions Raised at Trial

UNITED STATES OF AMERICA, PLAINTIFF

v.

OLYMPIA PROVISION & BAKING CO., INC. AND PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, DEFENDANTS

I.

LEVET, *District Judge:* On pages 889 through 900 an offer of proof was made with respect to testimony of one Gregory Papalexis. The offer of proof from this source was taken by the court subject to a ruling. Objections were made by defendant Local 627 that the testimony was hearsay. The government presses the acceptance of such testimony on the ground of co-conspirator's testimony, statements, etc. made during and in furtherance of the conspiracy.

I have reviewed this testimony and I conclude that it is admissible. The objections of Local 627 are, therefore, overruled and the relevant portions of the admissible testimony are accepted. See *United States* v. *Annunziato,* 293 F. 2d 373, 378 (2nd Cir.), cert. denied, 368 U.S. 919 (1961); *United States* v. *Im-*

perial Chemical Industries, Ltd., 100 F. Supp. 504. *United States* v. *Birnbaum*, 337 F. 2d 490, 494–495 (2nd Cir. 1964) is not applicable to the present situation.

By reason of objections made and sustained during the course of the offer made by counsel for the plaintiff, it is hereby stated that the portions of the testimony of Gregory Papalexis contained in the said offer, which are admitted, are as follows:

"By Mr. HARRIS:

Q. Mr. Papalexis, would you tell us in substance now what your father said to you in August of 1956 just prior to August 27th?

A. My father told me that he had attended a meeting at Mr. Horn's office where Mr. Gilman and Mr. Frankel—Ferdinand Frankel—was present. And I believe he also told me that Julius Frankel was present, although I am not sure of that.

The COURT. From Sabrett?

The WITNESS. From Sabrett.

A. (continuing) And Mr. Gilman from Superior, and that they had reached an agreement, they had made a deal to raise the price of the frankfurters and rolls, and also to give the distributors a larger commission." (pp. 891–892)

"The COURT. * * *

Do you recall your father saying anything about anybody else being there? If you do, tell us what was said. If you don't recall, just say 'I don't recall.'

The WITNESS. Your Honor, he told me that he went to Mr. Horn's office and he had met there with Mr. Frankel and Mr. Gilman and I also believe he mentioned the younger Frankel's name, and they made a deal to raise the price of frankfurters and rolls and to also give the distributors a higher commission." (pp. 893–894)

"By Mr. HARRIS: * * *

Q. Let me show you this Exhibit 4 for identification. Will you look at it?

A. Yes.

Q. Does that refresh your recollection as to whether your father described anything else that was said at this meeting that he told you about?

Just say yes or no if it does.

A. Yes. Yes, it does.

Q. Now with your recollection refreshed, can you tell us what else he said that had been said at the meeting that he described to you?

A. He said that this was the prices that they had agreed on at that meeting.

Q. That was?

By the COURT:

Q. That what was?

A. This listing right here of prices is what they had agreed to.

Q. Oh Exhibit——

Mr. HARRIS. 4 in evidence

Q.—4 in evidence. All right.

A. These were the prices that they had agreed to.

The COURT. All right.

A. (Continuing) To publish to the trade.

By Mr. HARRIS:

Q. Now did your father tell you to do anything on this occasion?

A. Yes, he told me to put these prices into effect and to give the distributors an increased mark-up.

Q. Of what?

A. Well, the price went from 55 cents a pound to 60 cents a pound.

* * * * *

The COURT. You are speaking of the list price?

The WITNESS. The list price and the distributors' commission went from five cents a pound to eights cents a pound on frankfurters, and the

rolls went to five cents a dozen from a price of four and a fraction.

I think that's what their price was before." (pp. 896–898)

E.

PLAINTIFF'S MOTIONS TO STRIKE

I

Plaintiff's motion to strike Exhibits 108 and 109, which were photographs of a truck of one of the Sabrett distributors, Benjamin Goodman, and of a Sabrett house truck (780–782) is hereby denied.

II

Plaintiff's motion (1119, 1563) to strike the testimony of Staub concerning the studies made by Superior on the comparative cost to the company of direct delivery through house drivers and indirect delivery through distributors (1096–1104, 1114–1115) is denied. This is without present indication of the weight and applicability of such evidence or materiality thereof. The court will subsequently determine these and any other pertinent questions in reference thereto.

III

Plaintiff's motion (1564) to strike the testimony of Staub with reference to sales made by Superior to certain customers (1083–1093) is denied.

IV

Motions made by plaintiff (1564) to strike the testimony of Julius Frankel with respect to competition between Sabrett and firms such as Hygrade, whose employee-drivers are represented by Local 627 (1240), and a similar motion with respect to testimony of

Gori Carfora on the same general subject (1327–1328), are denied.

V

Plaintiff's motion (1564) to strike DU Ex. 111, prepared by Sabrett, showing losses of customers to such firms as Hygrade and Anderson & Tarlow and acquisitions of customers from said processors which employ Local 627 drivers, is denied.

VI

Plaintiff's motion (1566, 1331, 1333) to strike the testimony of Gori Carfora, to the effect that during collective bargaining agreements between Sabrett and the union which represented Sabrett house drivers, Sabrett threatened to convert drivers into distributors (1330–1334) is denied.

VII

Plaintiff's motion (1565) to strike Horn's testimony, that in a 1935 strike by Local 627 employees against manufacturers of frankfurters in the Metropolitan District, distributors were used to service the house accounts of such striking Local 627 salesmen (1432–1439), is denied.

VIII

Plaintiff's motion (1472, 1565) to strike all union agreements introduced (Deft. Ex. DU 3, DU 4, DU 36, DU 45, DU 79, p. 1469) which contained distribution discount or differential provisions similar to those negotiated in the late 1940s with Sabrett, Superior and Olympia, is denied.

IX

Plaintiff's motion (1566) to strike the testimony of John Alexis, to the effect that before he became a distributor he had worked as a chauffeur for Olympia (329, 330), is denied.

DEFENDANT'S MOTIONS TO STRIKE

I

Defendant's motion (1568) to strike testimony that distributors took certain deductions in their tax returns (62, 188), is denied.

II

Any motion (1568, 159) by defendant to strike any pretrial admissions or trial testimony with respect to contributions or payments by manufacturers on behalf of distributors to Local 627 Welfare Fund is denied.

III

Defendant's motions (1000, 1006, 1013) to strike the testimony of Costa, are denied (997–1014).

IV

Motion of defendant (1121) to strike the testimony of Harry Staub (1053–1056) with respect to an incident occurring in 1956 at the office of the union involving a dispute over a customer is granted (1074–1075).

So ordered.

Dated: New York, N.Y., February 27, 1968.

/s/ RICHARD H. LEVET,
United States District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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62 Civil 2031, Amendment to Memorandum on Evidentiary Question Raised at Trial

UNITED STATES OF AMERICA, PLAINTIFF

v.

OLYMPIA PROVISION & BAKING CO., INC. AND PROVISION SALESMEN & DISTRIBUTORS UNION, LOCAL 627, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, DEFENDANTS

LEVET, *District Judge:* Since rendition of my original memorandum dated February 27, 1968, my attention has been called to certain testimony on pages 961 and 962 which related to an offer by plaintiff in respect to the testimony of Gregory Papalexis. I have examined these pages and I direct that my memorandum of February 27, 1968 be amended by the insertion of the following between pages 4 and 5 thereof:

> "Q. [By Mr. Harris] Do you recall now whether or not your father on the occasion of the conversation which you testified to this morning made any further statements with reference to anything said or individuals present?
>
> "A. [By Mr. Gregory Papalexis] Well, in line with this statement there——
>
> "The COURT. Had what?
>
> "A. That Mr. Horn had fought for the difference in the commission, to increase the amount of commission to the distributors." (pp. 961–962)

So ordered.

Dated: New York, N.Y., March 7, 1968.

RICHARD H. LEVET,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1969